APPENDIX A

United States District Court, Northern District of New York

Civil No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

Petition To Approve Plan of Divestiture

Hearing held Nov. 2, 3, 4, 1966; Submitted Dec. 5, 1966; Decided Dec. 21, 1966.

MEMORANDUM DECISION AND ORDER

BRENNAN, *Judge:* Pursuant to the terms of the final judgment herein, the defendants under date of October 17, 1966, have filed a petition requesting this court's approval of a proposed plan of divestiture of the properties of the Rome Cable Corporation now held by Aluminum Company of America. The plaintiff opposes the approval of such plan.

This proceeding arises out of a contested antitrust litigation, the background of which is found in *United States* v. *Aluminum Company of America and Rome Cable Corporation*, 214 F. Supp. 501, reversed in 377 U.S. 271; and in this court's decision (unreported) dated April 27, 1966 which fixed the terms of the final judgment. Familiarity with these decisions will be assumed. As in previous decisions, the defendants will be referred to as "Alcoa" and "Rome" respectively.

In accordance with the direction of the United States Supreme Court, and the provisions of the subsequently entered final judgment, Alcoa was directed to sell all of the assets of Rome acquired by Alcoa in 1959. Such sale is to include the manufacturing facilities of Rome, New York, Torrance, California and Collegeville, Pennsylvania, together with all subsequent capital improvements, machinery, inventory and work in process. As indicated above, defendants now present a proposed plan whereby such assets will be sold to The Okonite Company, hereinafter referred to as "Okonite". The purchase price of such assets will apparently involve a payment of between thirty and thirty-five million dollars, same to be paid in cash in three installments, the first payment of one-third of the purchase price to be made on the date of the closing of the transaction and the balance in equal installments three and six months thereafter. Alcoa retains or obtains no creditor or lien interest in such assets. In other words, the plan contemplates the complete divestiture ordered. Other details of the proposed plan would seem to be unnecessary to this decision.

Under date of October 27, 1966, the plaintiff filed with this court a memo in opposition to the defendants' petition, referred to above. The quotation below, taken from the above memo, sets out the bases of the plaintiff's opposition. "Plaintiff objects to Alcoa's proposal on two grounds: (1) it will not adequately dissipate the anti-competitive effects of its acquisition of Rome; and (2) the combination of Rome and Okonite would raise additional significant competitive problems". The issues, thus created, came on for a hearing before this court on November 2-4, 1966. Oral evidence was offered by defendants and documentary evidence on behalf of the defendants was received.

The plaintiff relied upon documentary evidence alone. Briefs have been submitted and the problem is before the court for decision. Since the decision necessarily involves the consideration of the status of the three interested corporations in the business world, a summary statement relative to same would seem appropriate at this point.

Okonite is a eighty-three percent-owned subsidiary of Ling-Temco-Vought, Inc., hereinafter referred to as "LTV", and was organized to acquire the business and properties of a corporation of the same name in accordance with the decisions in *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95 and 249 F. Supp. 154. It is a non-integrated fabricator of wire and cable products with plants located in Passaic, Paterson and North Brunswick, New Jersey and Philipsdale, Rhode Island. Its wire and cable business is concentrated in heavy duty, high voltage products. Its principal lines consist of high voltage paper insulated cable, communications cable, control cable, signal cable, power cable and bare copper. Like most companies engaged in a similar business, Okonite suffered substantial financial losses from 1958 to 1963. After its acquisition by LTV, Okonite's volume of sales and income have substantially increased. Okonite is not an actual competitor in aluminum conductor lines of commerce. Since the early part of 1965, it has made no such products and is not recognized in the market as the supplier of same. Its experience for three years in the aluminum conductor products field was apparently unsuccessful from either a market share or financial return basis, it being evident that it lacked the technology necessary in that field. In a word, it specializes in high voltage copper cables and its plants are oriented to principally produce such products.

Concededly LTV is a strong, well-managed diversified business corporation. It operates through four subsidiaries in the development and production of materials in the fields of aeronautics, electronics, missiles, space and through Okonite in wire and cable products. It thus seeks protection through product diversification from serious financial loss resulting from the cycles of business expansion and recession. It shows steadily increasing net assets which approximate 220 million dollars as of June 30, 1966. It also shows a substantial increase in sales and profits for the first nine months of 1966 as compared with the same period of 1965. It has continued to successfully operate its several business enterprises as indicated in Judge Ryan's decision in United States v. Kennecott Copper Corp., supra, the repetition of which is unnecessary here. We borrow from the above decision by paraphrasing Judge Ryan's statement to the effect that we find that LTV has the financial and top-level management capabilities necessary to permit its subsidiary Okonite to purchase Rome for cash and thus sever all financial and management ties with Alcoa. Its success in the operation of Okonite justifies the decision to permit its purchase of that corporation and contributes to the attractiveness of the submitted plan. This court is satisfied that the intention of both LTV and Okonite in the purchase of Rome is to maintain and expand its position as a competitor in the market available to its products. It seems plain that the purpose of the purchase of Rome is to obtain a full line of aluminum and copper wire and cable products which will complement those already manufactured and sold by Okonite. Again it seems plain that the purpose of the purchaser here is to complement its product line rather than to assimilate a competitor.

Rome's position in the market both at the time of its acquisition by Alcoa and subsequent thereto has been specifically found in the prior decisions referred to above and a detailed repetition thereof would serve no useful purpose. It would appear to be sufficient to state that Rome is substantially the producer of the wire and cable products limited to what is termed in the trade as low voltage. It is non-integrated as to both copper and aluminum products and like many corporations engaged in similar activities, it conducted its business at a substantial financial loss for the years 1960, 1961, 1962 and 1963. It presently shows a profit in its operations which is apparently due to the unusual favorable market conditions, especially in the matter of copper products.

Rome's operations, which show a profit for the years 1964, 1965 and 1966, indicate that this is a favorable time for a sale of its assets. If any mistake has been made in the past, it seems to the writer that it rests upon the doubtful assumption that Rome would have had, or could obtain, the required working capital to survive the over 12 million dollar loss incurred in operations during the 1960 to 1963 period and additionally to provide the apparently necessary improvements to its machinery and facilities which required an outlay of approximately 5 million dollars. While the dark period of the above picture occurred subsequent to the acquisition of Rome by Alcoa, no fault is attributed to its management. In fact, the Government pays a high compliment to Alcoa's stewardship of Rome's operations which is referred to at some length in this court's decision dated April 27, 1966 and referred to above.

We do not need to go beyond the decision of *United States v. DuPont Co.*, 366 U.S. 316 to find the guide lines which this court must use in determining the

legal and factual effectiveness of the proposed plan to accomplish the divestiture directed. In sum, they seem to indicate that this court is vested with a degree of discretion to be exercised in the light of the object to be obtained. As in the above decision, the violation here was "not actual monopoly but only a tendency towards a monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency". "Divestiture is itself an equitable remedy designed to protect the public interest". The public importance of the proper disposition of antitrust cases "in their remedial phase, more often than not, is crucial". The ultimate measure must eliminate the effects of the violation found without being punitive in its nature or limited by economic hardship. At the same time, the competition afforded by Rome should be preserved both because of its importance in the communities in which it operates and the effect it exerts in the business world.

The Government's first objection to the plan, to wit—that the proposed sale would not adequately dissipate the anti-competitive effects of Alcoa's acquisition of Rome, is rather difficult to follow. As this court understands the decision of the United States Supreme Court, it found contrary to this court's decision that aluminum conductor was a line of commerce in which the legality of Alcoa's acquisition of Rome could be measured. A finding of illegality followed since both Rome and Alcoa possessed market shares therein which were held to be substantial enough so as to tend to reduce competition in violation of the statute. Since Okonite does not manufacture aluminum products of any kind, it would seem to necessarily follow that the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan.

The second objection is to the effect that the combination of Rome and Okonite would raise additional significant competitive problems. This contention seems to be based upon two arguments. The first is to the effect that there is an overlap in the copper products manufactured by Rome and with those manufactured by Okonite. The second is to the effect that both Rome and Okonite are potential competitors in the market for their manufactured products in that they are capable of internal expansion so as to manufacture and market products which are now solely manufactured by either of the two companies.

The first of these arguments, as to the overlap products, impresses this court as involving conceded facts which are of de minimis proportion. Without doubt, it is true that both companies are engaged generally in the wire and cable business. As previously stated, Okonite's operations are solely confined to high voltage copper cable and conductor products with special emphasis upon the paper and rubber insulated conductor items. Its products seem to be most generally adapted to special uses and may be referred to as of the underground type. Rome, in contrast to the purchaser, is essentially a low voltage product manufacturer using primarily thermo-plastic and thermo-setting insulations. It specializes in the building wire type of product which is not manufactured by Okonite.

The overlap of products appears to be found in the Power Wire and Cable census category which is divided by voltage capacities into two classes—to wit—those under 601 volts and those over the above voltage. In 1964, the last year in which the census tables for the above products are available, it appears that there is an overlap of products in four of the ten five-digit product classifications. In three of four such

classifications, the combined shares of Rome and Okonite therein are listed as less than 5% of the total shipments in those categories. Overall Okonite's three largest products account for about eighty-three percent of its total power cable shipments, none of which is manufactured by Rome.

In the matter of the sub-classification known as Portable Wire and Cable, Rome's percentage of the total shipments was 2.5% while Okonite's was 12.6%, resulting in a total of 15.1%. Passing over the other three overlapping categories as insignificant in amount, it must be admitted that the last mentioned sub-classification cannot, on its face, be so termed. The explanation thereof however indicates that the overlap is more theoretical than real. The above statement is supported in the evidence, explained in Government exhibit 800, where it appears that both molded and non-molded portable cable are included in the above sub-classification. Okonite manufactures principally molded portable power cable with its sales in 1965 representing 96% of its total sales of portable cable. On the other hand, Rome's product is principally non-molded portable cable and represents 64% of its sales of portable power cable products. The process of manufacturing the two products is different and their end usages differ with respect to a large part of the products referred to manufactured by each company, molded portable cable being used in heavy industry while non-portable cable is used in light industry and may be sold through retail outlets. All of the above leads to the conclusion that the overlap products manufactured by Rome and Okonite are insignificant competitive factors as between the two organizations. In other words, they are not considered in the trade as among themselves as significant direct competitors.

There remains to be considered the contention advanced by the Government that Okonite and Rome, if not actual, are potential competitors. Without doubt, this argument involves a measure of speculation. Common experience is full of examples of business failures due to overexpansion in competitive business especially involving managerial ability and technical skill. It is easy to say that both Rome and Okonite possess the potential to expand internally so as to become an actual competitor with the other. It is a fact, however, that Rome has been in existence since 1936 and Okonite since 1878 and neither has, over the above periods of time, developed the full product line which the Government contends is potentially readily available to both.

The Supreme Court in *United States* v. *Penn-Olin Co.*, 378 U.S. 158 at 174 states that potential competition cannot be put to a subjective test. Its definition is not susceptible of a ready and precise answer. A potential competitor apparently contempletes "an aggressive, well-equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market * * *". No argument can be made that Rome is or was such a competitor for several years last past. Okonite, in its present position, meets some of the requirements of the definition. However the argument that it is "waiting anxiously" to enter the above market is directly contrary to the evidence produced. Its prior unsuccessful effort in the aluminum field may well have dampened its ardor. Certainly its interest in that field has not been "long sustained" and its experience therein is some proof that it lacked "the know-how and the capacity to enter that market" * * * "at a reasonable profit". The "array of probability" found in Penn-Olin is entirely missing here.

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The business policy of a corporation rests primarily upon its officers and directors who are held accountable in the matter of their business judgments. It is true that the governing body of aggressive corporations is constantly reviewing its product lines, the quality thereof and the avenues of expansion. It is likewise correct that Okonite contemplates a business expansion but it should be emphasized that same is limited to a product or the products which are already being manufactured by that company. Here there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies. It seems that "corporate growth by internal expansion is socially preferable to growth by acquisition". *United States v. Philadelphia Nat. Bank*, 374 U.S. 321 at 370. This court however has no basis to assume that the present policy of the governing body of either involved corporation will in the foreseeable future reverse its present policy of management so as to increase its product lines and thereby become actual competitors in the market place. The judgment of experienced businessmen is more reliable than speculation, hedged as it must be by a tight money market which seems to restrict venture capital investment. This is indicated by the lack of individual or syndicate interest in the purchase of Rome assets.

Although not a specific objection to the present petition, the Government urges that same should be rejected and further effort to dispose of Rome to a more acceptable purchaser be directed. There is no specific fault found with the means taken by Alcoa to accomplish the sale of Rome's assets. If, in fact, Oko-

nite be an eligible purchaser, further effort would seem not only to be unnecessary but detrimental to Rome's viability. The offer made constitutes a clear, clean and complete divestiture by Alcoa of Rome's assets. It obviates many, if not most, of the objections which are generally advanced in similar proceedings. It eliminates the unrest among Rome's personnel and assures them of a strong aggressive employer who has given assurance as to the continuance of Rome's presently located three manufacturing plants. It should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understandably, has been missing since the order of divestiture. The benefit to be obtained by the closing of this litigation at this time would seem to far outweigh any speculative advantage which would result from further delay.

It should be noted that the plaintiff appears to avoid advancing any contention that the proposed plan is in violation of the antitrust laws. The plan has been under consideration by the plaintiff since about August 15, 1966. It would therefore seem that no claim of such violation will be made since plaintiff, by reason of past litigation involving both Rome and Okonite, must be well acquainted not only with the wire and cable industry as a whole but with the output of the facilities and the market status of the two corporations.

In the main litigation here, the plaintiff appeared to urge that the acquisition of Rome by Alcoa resulted in an undue concentration of power in one of the giants of the aluminum industry. As this court sees it, the proposed plan would result in a company

with a full product line actually and potentially supplying the competition to the integrated copper and aluminum producers and larger independents while not significantly reducing competition among the two hundred so-called small non-integrated fabricators. The relative position of Rome-Okonite in size among the so-called independents would not thereby be changed, but the much larger producers would be afforded a more active competition in the market.

The above discussion and the findings expressed therein lead to the conclusion that the proposed plan is simply "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market". *Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 319. As such a merger, same is not impeded either by the statute or judicial interpretation. Economies in operation and an increase in competition, rather than a diminution thereof all in the public interest, invoke both the judgment and discretion vested in this court to approve the submitted plan in accordance with the prayer of the petition.

The above will constitute this court's findings and conclusions and if either litigant desires additional specific findings or conclusions, same may be submitted within ten days.

An order, providing for the approval of the proposed sale of Rome's assets to Okonite in accordance with the above decision will be prepared by Alcoa accordingly and, if not agreed upon, may be settled before this court upon three days notice, and it is

Ordered accordingly.

STEPHEN W. BRENNAN,
Senior U.S. District Judge.

United States District Court for the Northern District of New York

Civil Action No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

ORDER APPROVING PLAN OF DISPOSAL

The Final Judgment in this case having been entered on April 27, 1966; the said Final Judgment having ordered and directed the defendant Aluminum Company of America (Alcoa) to sell all of the Plants of the defendant Rome Cable Corporation (Rome), as defined in Paragraph I(E) of the Final Judgment, to an Eligible Purchaser under specified conditions to be operated by said Eligible Purchaser as an operating business in competition with other firms engaged in the manufacture, production and sale of electrical conductor wire and cable products, conduit and cable installation devices; the defendants, by their Petition for Approval of Proposed Plan of Disposal filed October 17, 1966, having proposed to comply with the said Final Judgment by selling the Rome Plants, in their entirety, to The Okonite Company (Okonite), an 83 percent-owned subsidiary of Ling-Temco-Vought, Inc. (LTV); the plaintiff, by its Memorandum in Opposition, dated October 27, 1966, having objected to the defendants' Proposed Plan of Disposal; a hearing having been held at which oral and documentary evidence was presented and representations as to manner of intended use of the Plants having been made to the Court by officers of LTV; and the Court, upon consideration of the

evidence presented at said hearing and briefs submitted by the parties, having concluded in a Memorandum Decision and Order entered December 21, 1966, that the proposed sale of Rome Plants to Okonite constitutes a complete divestiture of Rome in accordance with the prior Supreme Court decision in this case and with the Final Judgment herein, and should be approved; now, therefore, it is hereby

Ordered, Adjudged and Decreed That:

1. Consummation of the Sale of the assets of Rome to Okonite in accordance with the terms and conditions stated in Defendants' Petition for Approval of Proposed Plan of Disposal, the letter agreement annexed thereto, and the Final Judgment and Memorandum Decision and Order herein dated December 21, 1966, will constitute a complete divestiture of the Rome Plants to an Eligible Purchaser;

2. The Court hereby approves the Proposed Plan of Disposal, and the transactions contemplated thereby, and authorizes defendants to enter into the necessary Agreement of Sale for consummation as soon as practicable;

3. Within five (5) days after execution of the Agreement of Sale, defendants shall submit a true copy thereof to this Court, with a copy to the plaintiff, and unless the Court or the plaintiff has noted objections thereto within ten (10) days after the filing and service of said Agreement, said defendants are authorized to close the sale in accordance with the terms of said Agreement and this Order. If objections to the Agreement of Sale are noted by plaintiff, and not thereafter resolved by the parties, the differences shall be settled by the Court on defendants' motion, with five (5) days' notice to the plaintiff;

4. Alcoa is directed to report to this Court within five (5) days after the sale contemplated by the Agreement of Sale referred to in Paragraph 3 hereof is closed.

(S) Stephen W. Brennan
STEPHEN W. BRENNAN,
Senior United States District Judge

Dated: Utica, New York, January 20, 1967.

Approved as to form.
DONALD F. MELCHIOR,
Attorney for Plaintiff.

APPENDIX B

United States District Court Northern District of New York

Civil No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

Hearing held Oct. 4–7, 1965; Submitted Mar. 7, 1966; Decided Apr. 27, 1966.

MEMORANDUM DECISION AND ORDER

Re: Judgment

BRENNAN, *Judge*: This memo is intended to indicate the bases of the court's entry of a final judgment in this action and to afford a brief explanation thereof. The defendants will be referred to as "Alcoa" and "Rome" as in the pertinent prior decisions.

This is an antitrust litigation, the background of which is found in *United States* v. *Aluminum Company of America and Rome Cable Corporation*, 214 F. Supp. 501 and in 377 U.S. 271. The latter decision of the Supreme Court reversed the prior mentioned decision of this court and provided that "since there must be divestiture, the case is remanded to the District Court for proceedings in conformity with this opinion".

The lapse of time is principally accounted for by the good faith efforts of counsel for the litigants to agree upon a form of judgment which would meet the practicalities of the existing circumstances and at the same time carry out the mandate of the Supreme Court. It is sufficient to say that the efforts of counsel and the court were not successful in their purpose. A hearing was then held on October 4, 1965 at which both oral and documentary evidence was offered by the defendants. The plaintiff offered documentary evidence. Counsel next presented numerous proposed Findings of Fact. Briefs were filed by both parties and proposed final judgments were submitted. On February 4, 1966, at the request of the court, counsel appeared before the court at which time the court indicated its then conclusion as to the form and content of the proposed final judgment to be entered. As the result of this conference, the positions of the litigants were somewhat modified. Counsel were urged to agree upon the form and content of a judgment which would reflect the substance of the provisions which the court indicated were justified by the evidence. Efforts to accomplish the above result are apparently at a stalemate and the court has proceeded to prepare and enter a final judgment which it feels adequately protects the interests of the litigants, complies with the mandate of the Supreme Court and serves to protect the public and local interest insofar as same can be evaluated at this time.

Generally speaking, the difficulty here seems to arise by plaintiff's general contention to the effect that the language of the Supreme Court decision requires the complete divestiture of Alcoa's interest in the assets of Rome and the restoration of that company as a financially strong, well managed, viable corporation, capable of continued existence in the competitive area of the business world.

Alcoa, on the other hand, contends that the mandate of the Supreme Court is something less than absolute and that the language of the decision must be read in the light of the limited nature of the violation found. It further contends that the relief to which the plaintiff is entitled must be based upon equitable considerations, keeping in mind the factual circumstances affecting the public, the community interests and the obvious requirement that this court should not, by its decision, deny to the defendant Alcoa the business advantages granted to a competitor similarly situated.

THE LAW

Only brief reference is necessary to indicate to the litigants the court's awareness of its responsibility and of the legal principles which must serve as guides in the matter of the divestiture ordered. In *Gilbertville Truck Co.* v. *U.S.*, 371 U.S. 115 at 130, the obligation of the court here is expressed as a "heavy responsibility" to afford a remedy consistent with the facts before it "with as little injury as possible to the interests of private parties or the general public."

The Supreme Court in *U.S.* v. *duPont & Co.*, 366 U.S. 316 outlines in concise language the principal factors which must guide the court in the solution of the problem involved. It is generally recognized and specifically mentioned in the above decision that District Courts are vested with a "large discretion" in affording ultimate relief. The discretion however must be exercised in the light of the purpose of the statute and the circumstances involved. The relief to be granted must not be punitive but an effective remedy is not to be discarded solely because it will invoke an economic hardship. Divestiture is the most important of antitrust remedies and must be considered by the

court. The relief granted is usually found in some form thereof. The protection of the public interest is the purpose of the statute and it is served when a violation of the statute has been found and the relief effectively pries open to competition a market that has been closed by defendant's illegal restraints. There is no serious dispute as to the above principles but the application thereof under the circumstances of this case has been and is a matter of definite controversy. We then turn to the facts, circumstances and equities as this court finds them which have prompted the judgment referred to above.

THE SUPREME COURT DECISION

In the original action in this court, the plaintiff contended that the statute had been violated, by the merger by acquisition of the two defendants, in ten separate lines of commerce. This contention was rejected by this court as to each separate line. It appears without contradiction that on appeal to the Supreme Court, the plaintiff contended that this court had committed legal rather than factual error insofar as the decision found no violation of law as related to the lines of commerce designated as aluminum conductor wire and cable and insulated or covered aluminum wire and cable. The Supreme Court, in its decision, upheld plaintiff's contention so that the violation ultimately found relates only to a comparatively small segment of the business conducted by Rome prior to the merger. The controversy then only involves aluminum conductor products and will so be referred to in this decision.

A considerable argument has been advanced by the plaintiff to the effect that the Supreme Court decision in itself mandated the complete [divestiture] by Alcoa of all of the assets acquired from Rome and

the restoration of Rome as a viable competitive entity. For all practical purposes, it is urged that this court has no alternative but to direct the restoration of Rome as it existed prior to its acquisition. This court is unable to completely adopt such argument. If the Supreme Court had intended to limit or nullify the equitable powers which are ordinarily reserved to the trial court, there would seem to be no reason why the proceding should have been remanded. A simple direction to enter a final judgment in accordance with the above argument would have been sufficient. Divestiture may be accomplished in many ways and this court concludes that the Supreme Court did not intend to relieve this court of its obligation to determine the nature of the relief which must be granted or to confine same in an inflexible mould.

THE PLANTS

Rome, at the time of the acquisition, maintained manufacturing facilities at Rome, New York; Torrance, California; and Collegeville, Pennsylvania. It may be said that the principal facility was located at Rome, New York and employed at that plant about one thousand persons. This facility was engaged primarily in the manufacture of copper products, including wire and cable. It was at that plant, however, that the aluminum conductor products were manufactured which was the basis of the holding that the acquisition was in violation of the statute. The Torrance, California plant principally manufactures rigid steel conduit and tubing. The plant at Collegeville, Pennsylvania manufactures cable troughs, ladders and ducts for supporting or enclosing electrical conductors. Neither the Torrance nor Collegeville plant contained facilities for the manufacture of electrical conductors. There has been and is no contention that

either plant was engaged in or possessed the facilities to manufacture the items upon which the violation of the statute was found.

The plaintiff, prior to the hearing of October 4, 1965, presented no actual plan or procedure by which the mandate of the Supreme Court may be accomplished. Its proposed judgment simply provides that Alcoa "shall divest itself of all ownership of Rome and re-establish Rome as an independent and viable competitor". Jurisdiction in the court is to be retained only to permit implementation of the above direction. Same is construed to foreclose any consideration of the adequacy of a partial divestiture or any other type of relief in the event that a sale of the assets to a purchaser, satisfactory to the court, cannot be made.

As already indicated, both litigants have been unable to agree upon the provisions of the judgment as discussed at the conference of February 4, 1966. Both the plaintiff and Alcoa have subsequently submitted their version of such judgment which contains both a direction to Alcoa to divest itself of the Rome properties and the procedure to be followed to accomplish same. Neither of said proposed judgments has been adopted in all detail and discussion of same would seem to serve no useful purpose.

THE PLANS OF DIVESTITURE

About December 1, 1964, Alcoa submitted a proposed final judgment and plan of divestiture which will be referred to as the Triangle Plan. In effect, it provided for a partial divestiture of the assets obtained by the acquisition of Rome, limited to the offending aluminum conductor lines of commerce. Since same is not adopted by the court at this time, only brief reference will be made thereto.

The plan provided for the elimination of the offending aluminum conductor lines of commerce as a product of the Rome plant. It in effect is intended to divest the aluminum conductor portion of Rome's business, the acquisition of which was found to be in violation of the statute, to transfer the competition afforded thereby to Triangle, together with certain machinery, good will and trademarks. It bound Alcoa to cooperate with Triangle in the matter of the expansion of Triangle's aluminum conductor business to the end of creating a competitor in the above lines of commerce, with a potential equal or greater than that possessed by Rome. This plan was strenuously opposed by the plaintiff and this court is not inclined to adopt it at this stage of the proceeding or at least until another less speculative plan is tested.

In March 1965 an alternative judgment was submitted by Alcoa which has come to be known as the Kaiser Plan. It provided in substance that Alcoa be directed, within a stated time period, to sell the assets acquired from Rome to a purchaser. It provided that the upset price to Alcoa, payable by a purchaser, be based upon the adjusted book value of the land, plants and equipment and the book value of materials or inventories as of the date of sale, same to include the capital expenditures made by Alcoa up to that date, the purchaser to assume the obligations of Alcoa insofar as the rights of employees are provided for in the existing labor and pension payment obligations. It was further provided that if Alcoa is unable to sell the plants within the time period set forth and in accordance with the price provision referred to above, that Alcoa should have the right to apply to the court for a determination by the court, Alcoa shall be relieved from further obligations to

sell the plants. This plan of divestiture was likewise strenuously objected to by the plaintiff, especially as to the two provisions referred to above. In other words, the plaintiff opposed both the upset price provision and the provision which would ultimately allow Alcoa to keep the properties upon a finding by the court that a good faith effort to sell same had been made.

The Kaiser Plan or judgment follows the provisions of the consent judgment in the civil action entitled *United States* v. *Kaiser Aluminum and Chemical Corp.*, Civil Action No. 2795, District of Rhode Island. It is difficult to answer Alcoa's contention to the effect that so long as the Kaiser Plan is recognized by the government as equitable and in the public interest, that it should be afforded the same relief upon a showing that the circumstances are so similar in the matter of the underlying considerations as to be practically identical. The Government's answer to this contention is something less than satisfactory.

The judgment herein generally follows the judgment in the so-called Kaiser case except that the provision in the latter plan, which permits Kaiser to retain the acquired assets upon a finding of the court that a *bona fide* effort to sell same was without result, has been eliminated. The reason for this action is apparent without extended explanation since such provision permits the offending party to retain the competitive advantage, the acquiring of which has been held to be in violation of the statute. The upset price provision in the Kaiser judgment has been retained herein for several reasons. In the first place, the court is impressed that the broad line of copper products manufactured by Rome and the somewhat more limited line of aluminum products manufactured by Rome necessarily restricts as eligible purchasers

those presently involved in the manufacture of similar products since by acquiring Rome assets, they may run afoul of the antitrust laws. This situation leaves the most likely purchaser to individuals or firms not presently engaged in the manufacture and sale of competing products. The ultimate object to be attained is the restoration of Rome under an ownership which in good faith intends to continue its operation in the future as an active competitor in the sale of the products which it manufactures. Neither the public nor local interests will be served if the Rome properties be transferred under court order to anyone whose purpose is dedicated to a short term profit or to the piecemeal disposition of its assets. It is not intended however that Alcoa should automatically reject any and all purchase offers which do not meet the upset price. The provision in the present judgment is intended to eliminate speculators but not to automatically exclude purchasers showing an ability and an intention to continue Rome as an active competitor in its field.

MATTERS CONSIDERED IN ARRIVING AT THE JUDGMENT HEREIN

Since the court has here adopted substantially all but one of the provisions of the Kaiser judgment, it would seem incumbent that the factual and legal bases for such action be discussed or enumerated.

It is realized that, generally speaking, judgments based upon the consent of the litigants have little, if any, probative force in subsequent litigation involving a different defendant. *U.S. v. duPont & Co.*, supra, footnote 12, page 330. Here, however, we have such a similarity of facts as to warrant the consideration of the Kaiser judgment in exercising the equitable obligation imposed upon the court. The plaintiff here has asserted in unequivocal language that the Kaiser ac-

quisition "fostered" several similar acquisitions including the acquisition of Rome by Alcoa. This fact is recognized by the Supreme Court in *United States v. Alcoa*, supra, in note 6 on page 279 as a factor influencing Alcoa's decision to acquire Rome about two years later. Likewise the plaintiff conceded by its own statement that Rome was approximately the same size as the company acquired by Kaiser which, like Rome, "was one of the leading non-integrated fabricators of aluminum and other kinds of wire and cable". Likewise the plaintiff recognized prior to the entry of the Kaiser judgment that "Alcoa ranked second only to Kaiser in the production of insulated and covered aluminum wire and cable". The above concessions or assertions by the plaintiff would seem to require the consideration by this court of the terms of the Kaiser judgment since it can be fairly assumed that the plaintiff does not seek to place one competitor in a more unfavorable position than another in the same line of business.

Proceeding a bit farther, it is established that the same aluminum conductor line of commerce upon which the Supreme Court decision was based here was likewise involved in the Kaiser litigation. Additionally the public interest, which is the primary consideration in this type of litigation insofar as economics are concerned, is strikingly similar in both litigations. The effect of divestiture upon the economic condition of the local community involved is a factor to be considered in the matter of the public interest as a whole. Here the two geographic areas involved to wit: Utica-Rome, New York and the Providence-Pawtucket, Rhode Island—were classified, at the relevant times involved, as depressed areas insofar as the labor market is concerned. In fact, the Utica-Rome

area appears to be more seriously affected since any change in status therein is occasioned by out migration of labor while the change in the Rhode Island area appears to result from the increase in work force thereto. The present action was brought to trial and the decision of the Supreme Court was made prior to the entry of the Kaiser judgment. As long as it is conceded that the Kaiser acquisition fostered the Rome acquisition, it is not unlikely that the Supreme Court decision in the instant case afforded the motivation for the consent decree under discussion.

All of the above has prompted this court to adopt the Kaiser judgment in all but one of its essential parts. The following quotation, taken from *International Business Machines Corp. v. U.S.*, 343 F. 2d 914 at 920, is appropriate. "Equality of treatment is so dominant in our understanding of justice, that discretion, where it is allowed a role, must pay the strictest heed". If parity in the levying of taxes is essential to free and fair competition, as stated in the above decision (p. 923), such competition is impeded where an inequality is imposed upon competitors acting in closely related violations and involving similar circumstances.

There can be no serious contention that Rome's need for additional capital expenditures or its record of earnings arises from mismanagement, since the acquisition by Alcoa. They are rather the result of market conditions concerning which considerable evidence was taken upon the hearing. Judge Dawson found the same condition in *United States v. Kennecott Copper Corp.*, 231 F. Supp. 95 at 104. The plaintiff pays Alcoa a compliment as to its management and as to the operation of the Rome facilities. Same

is found in plaintiff's brief submitted October 4, 1965, after the hearing in support of its contentions and is set out in the footnote below.[1]

In the course of the hearing in this proceeding, considerable evidence was received from community leaders, executives and labor representatives as to the detrimental effect of a divested Rome on the Rome facilities. Same has not been overlooked in the preparation of this judgment. It is intended to afford an opportunity to test the availability of total divestiture which appears to be a preferred remedy in similar antitrust proceedings. At the same time, it is intended to be elastic enough so as to leave the door open for further consideration of the application of other remedies or types of divestiture in the event that no purchaser, dedicated to the continuance of

[1] "The various Rome facilities have been staffed and continue to be staffed with competent personnel, some of whom before the merger occupied positions of responsibility in the Alcoa organization. Rome's production facilities, research and engineering programs, employee policies, procurement and accounting procedures, patent position, market contacts and product lines have all been preserved or improved during Alcoa's stewardship of Rome. There have been extensive improvements to the operating facilities through the expenditure of over $5 million. Abandoned facilities have been replaced by facilities of equal or better quality. Rome's procurement practices have been afforded a higher degree of autonomy than any other part of the Alcoa operation. Rome presently has excellent top level management. Its product line has been maintained and even expanded to keep pace with the industry, and Alcoa has preserved and expanded Rome's market contacts. Rome's research capabilities and patent position have been improved substantially since the acquisition; its accounting and procurement procedures have been improved by bringing them into conformity with procedures utilized by Alcoa."

Rome as an active competitor, is found. The judgment is not to be construed in any manner as forecasting the elimination of Rome's position in the business world it has occupied or in the local competition in which its facilities exist.

The entry of the judgment, filed simultaneously with this memo, is therefore directed, and it is

So ordered.

STEPHEN W. BRENNAN,
Senior U.S. District Judge.

Dated: April 27, 1966.

United States District Court
Northern District of New York

Civil No. 8030

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND ROME CABLE CORPORATION, DEFENDANTS

FINAL JUDGMENT

The Supreme Court of the United States, by its opinion dated June 1, 1964, having reversed the Judgment of this Court, entered in this cause on January 28, 1963, the Supreme Court having determined that the acquisition by defendant Aluminum Company of [illegible] of the business and assets of defendant Rome Cable Corporation is in violation of Section 7 of the Clayton Act, 15 U.S.C. 18; and the Supreme Court having remanded this cause to this Court for proceedings in conformity with its opinion; now, therefore, it is hereby

Ordered, Adjudged and Decreed as follows:

I

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, corporation, association, trustee or other business or legal entity.

(B) "Eligible Purchaser" means any person, firm, or corporation approved by the Court.

(C) "Alcoa" means defendant Aluminum Company of America, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office at Pittsburgh, Pennsylvania.

(D) "Rome Cable" means defendant Rome Cable Corporation (a wholly owned subsidiary of defendant Alcoa), a corporation organized and existing under the laws of the State of Delaware, with its principal office at Rome, New York.

(E) "Plants" means all of Rome Cable's manufacturing and production facilities (including lands, buildings, research laboratory, and all improvements effected between the time of acquisition and the time of sale) located at Rome, New York, Torrance, California and Collegeville, Pennsylvania, together with the machinery and equipment, raw materials, operating supplies, work in process, finished goods, and other inventory items located at the Plants or produced at the Plants and located elsewhere, and including also, the Rome Cable name, trademarks and good will.

(F) "United States" shall mean the United States of America, its territories and possessions.

II

Alcoa's acquisition of the business and assets of Rome Cable violates Section 7 of the Clayton Act, 15 U.S.C. 18.

III

The provisions of this Final Judgment applicable to Alcoa shall also apply to its directors, officers, agents, and employees and to its subsidiaries, successors and assigns, and to all other persons in active concert or participation with Alcoa who have received actual notice of this Final Judgment by personal service or otherwise. This Final Judgment shall not apply or relate to the activities or operations of Alcoa outside of the United States. None of the provisions of this Final Judgment shall apply to any person or persons who acquire any of the assets disposed of pursuant to this Final Judgment.

IV

(A) Alcoa is ordered and directed, within six months from the entry of this Final Judgment, to sell the Plants to an Eligible Purchaser which will operate the Plants as an operating business in competition with other firms engaged in the manufacture, production and sale of electrical conductor wire and cable products, conduit and cable installation devices. The net price to be paid to Alcoa for the Plants shall be no less than the total of:

(a) The adjusted book value of the land, plant and equipment of the Plants as of the date of sale, said adjusted book value being $16,338,040 as of December 31, 1964;

(b) The book value as of date of sale of all raw materials, operating supplies, work in process, finished goods, plant inventories and finished goods inventories as the same appears on the books of Rome Cable before deducting reserves for life, except, however, that said book value shall be adjusted to include aluminum, copper and steel content at market value as of date of sale;

(c) The amount of additional expense incurred by Alcoa for pension and termination pay payments, as provisions therefor, relative to employees of the Plants resulting from the fact that the pension and termination pay plans for said employees were [illegible] the time of acquisition by Alcoa, and

(d) All incidental expenses relative to the sale of the Plants and the transfer of said assets.

Without limiting the generalities of the foregoing, Alcoa may at any time make capital additions to the Plants and the book value thereof shall be included in the purchase price. In addition, the purchaser shall agree to continue pension and termination payment plans for the employees of the Plants, other employee benefits, and conditions of employment, upon terms no less favorable than those provided by Alcoa and shall assume all of the obligations of Alcoa relative to said pension and termination payment plans and to conditions of employment applicable to both past and existing employees of the Plant. In the event the full net price is not payable to Alcoa in cash, the terms and conditions of payment shall be such as are acceptable to Alcoa.

(B) If Alcoa is unable to sell the Plants as hereinbefore provided within six months from the date of entry of this Final Judgment, Alcoa may upon notice to the plaintiff be ordered to continue its efforts to sell the said Plants in accordance with the provisions of Paragraph IV(A) hereof for an additional three months, except upon a showing by defendants that there is no reasonable probability that the Plants can be sold within such extended period of time. If Alcoa is unable to sell the Plants within such extended period of time, or at the end of the original six months period if no extension of time is ordered, Alcoa shall

have the right to apply to the Court, on notice to plaintiffs, for a determination that it has made a *bona fide* effort to sell the Plants and has been unable so to do, in which event and on such determination by the Court, the Court may in its discretion,

(1) order that Alcoa be relieved from further obligation to sell any one of all the Plants; or

(2) order Alcoa to cease for a period of five years the manufacture in the Plants of the overlap aluminum conductor products, namely, bare all-aluminum cable and aluminum conductor steel reinforced in distribution sizes, insulated cable covered wire, and aluminum multiplex cable; or

(3) order Alcoa to divest to an Eligible Purchaser Rome Cable assets utilized in the manufacture, distribution and sale of said overlap aluminum conductor products; or

(4) upon good cause shown by either party, after appearing to the Court, order such other and different relief as shall appear to the Court to be appropriate in the circumstances.

(C) Alcoa shall make known the availability of the Plants for sale by customary and usual means. Alcoa shall furnish to bona fide prospective purchasers all reasonable information regarding the Plants had the specific consent so to do by Alcoa thereto, and shall permit them to make such inspection of the Plants as may be reasonably necessary for the above purpose.

[illegible] and affected by this [illegible] made in good faith and shall be [illegible] provided, however, that [illegible] may cause [illegible] of any [illegible] purchaser [illegible] any [illegible]

tion of the purchase price therefor, or performance of the sale transaction, and may also influence any other of the terms and conditions of the sale transaction as therein provided or as provided by [illegible]; provided, further, that should the Plants be returned to the control of Alcoa, it shall then dispose of the Plants in accordance with the provisions of this Section IV, with the time period to be computed from the date of the return of control.

V

If at any time during the periods prescribed by Paragraphs IV (A), (B), (C), and (D), Alcoa is in a position to effect divestiture of Rome as required therein, it shall inform the Court and the plaintiff of the details of its proposed plan of disposal. The effectuation of any such proposed plan of disposal shall be subject to the approval of the Court, after appropriate notice to plaintiff.

Upon petition of the plaintiff or upon the motion of the Court within the time periods above mentioned, Alcoa shall furnish such information as to the status of the proceeding ordered herein, as the Court shall direct.

VI

After the sale of Rome pursuant to this Final Judgment, no person shall, at the same time, be (1) an officer or director of Alcoa and (2) an officer or director of the purchaser of Rome.

VII

Alcoa is enjoined and restrained for a period of five years from the effective date of this Final Judgment from acquiring

(1) Any capital stock of any corporation which is engaged in the manufacture of electrical conductor wire and cable products in the United States; or

(2) All or any part of the assets (except for the purchase of products, commodities, machinery or equipment in the normal course of business) of a person engaged in the manufacture of electrical conductor wire and cable products in the United States.

This Final Judgment shall not prohibit Alcoa from acquiring in good faith the stock or assets of any person in the exercise of any security or debt or liability enforcement process, whether provided by law or bona fide agreement, so long as Alcoa shall dispose of such stock or assets within a reasonable period of time.

VIII

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Alcoa at its principal office, be permitted:

(1) Reasonable access, during office hours of Alcoa, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Alcoa relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Alcoa and without restraint or interference from it, to interview officers or employees of Alcoa, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, Alcoa, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such reasonable reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may, from time to time, be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the executive branch of plaintiff except in the course of court proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

Alcoa shall pay all taxable costs.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, the modification or termination of any of the provisions thereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

Charles W. Bunn,
District Judge.